No. 84-1560

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

THE PRESS-ENTERPRISE COMPANY,
a California corporation
Petitioner,

VS.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF RIVERSIDE,
Respondent.

ROBERT RUBANE DIAZ,
Real Party in Interest.

On Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF REAL PARTY IN INTEREST ON THE MERITS

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CONSTITUTIONAL PROVISIONS INVOLVED

California Constitution, Art. 1, sec. 1:

"All people are by nature free and independent and have inalienable rights. Among these are . . . pursuing and obtaining safety, happiness, and privacy."

California Constitution, Art. 1, sec. 2:

"(a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

Calfornia Constitution, Art. 1, sec. 15:

"The defendant in a criminal cause has the right to a speedy public trial ....

"Persons may not ... be deprived of life, liberty or property without due process of law."

California Constitution, Art. 1, sec. 16:

"Trial by jury is an inviolate right and shall be secured to all ...."

STATUTORY PROVISIONS

California Penal Code, sec. 868. Open and public examination; exclusion of public upon request of defendant and finding by magistrate, exceptions, person for moral support of prosecuting witness

"The examination shall be open and public. However, upon the request of the defendant and a finding by the magistrate that exclusion of the public is necessary

in order to protect the defendant's right to a fair and impartial trial, the magistrate shall exclude from the examination every person except [various identified functionaries] . . . ."

STATEMENT OF FACTS

Real party in interest, Robert Rubane Diaz, was charged by a complaint filed on December 23, 1981 with having murdered twelve hospital patients by administering overdoses of a heart drug.

At the commencement of his preliminary hearing on July 6, 1982, real party moved to close the hearing to the press pursuant to California Penal Code, Section 868. Although many representatives of television stations were present (Cal.S.Ct. opn., attached to petition, A-1), neither the press nor the prosecutor objected to closure. The magistrate found that "the motion should be granted in order to protect the defendant's right to a fair trial" (Tr. Vol. 1, p. 12) and accordingly closed the hearing.

The hearing lasted a total of 41 days. The defendant was held to answer on all counts and the reporter's transcripts of the preliminary hearing were sealed until further order of the court. (J.A., p. 37.)

On January 21, 1983, more than six months after the initial closure order, the prosecution moved in respondent superior court to unseal the transcripts of the preliminary hearing. Two weeks thereafter, on February 7, petitioner joined in the prosecution's motion.[1] Real party filed an opposition, claiming that the release of the transcripts would result in prejudicial publicity. On February 10, respondent court found that there was "a reasonable likelihood that release of all or any part of the trans-

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[1] We note that the opinion of the California Supreme Court mistakenly represents that the press made the initial motion, joined in by the prosecution.

cript might prejudice defendant's right to a fair trial." (J.A., p. 60.) Accordingly, the court declined to unseal the transcripts.

On September 30, 1983, the defendant waived his right to a jury trial. Respondent court promptly ordered the transcripts of the preliminary hearing unsealed.

The Court of Appeal of the State of California, Fourth Appellate District, Division Two, denied petitioner's petition for writ of mandate for review of respondent court's actions. The California Supreme Court granted the petition and retransferred to the Court of Appeal. The Court of Appeal again declined to disturb the trial court's ruling. The Supreme Court again granted review, and on December 31, 1984 issued its opinion which forms the basis of this proceeding.

SUMMARY OF ARGUMENT

At issue in this case is the right of a California criminal defendant, in a highly publicized case, to close his preliminary hearing to the press and public when necessary to protect his right to a fair trial. Equally significant is the question of the proper deference to be accorded the states in recognizing individual liberties under their own constitutions more expansive than those guaranteed by the Federal Constitution so long as those liberties do not infringe upon weighty Federal constitutional rights.

Real party in interest, Robert Diaz, was successful in closing his preliminary hearing pursuant to recently amended California Penal Code section 868, which authorizes closure upon request of the defendant and a showing that closure is necessary to protect his right to a

fair trial. The California Supreme Court upheld the constitutionality of the statute and further determined that closure had been proper in the instant case because real party had met his burden of showing a "reasonable likelihood of substantial prejudice" to his fair trial right.

Section 868 has provided strong protection of a defendant's right to close his preliminary hearing for more than one hundred and thirty years. The right has long been considered a "fundamental safeguard" of a defendant's right to a fair trial as well as his right to protect his reputation.

Those rights may well be more expansive than analogous rights recognized by the Federal Constitution. Nevertheless, the federal interest upon which they impinge -- the public's right of access to preliminary hearings -- is not so substan-

tial as to justify interference with the state's weighing of those rights. Access to preliminary hearings does not further the same weighty interests advanced by criminal trials primarily because the preliminary hearing is not a final adjudication and so, on the one hand, is not so critical as the trial itself or other pretrial hearings that do result in final rulings on issues other than culpability, and, on the other hand, creates a significant risk of prejudice to the defendant's right to a fair trial. Whatever the parameters of the federal interest in access to preliminary hearings, that interest is adequately accommodated by California's requirement that a defendant be entitled to closure only upon a showing of a "reasonable likelihood of prejudice" to his fair trial right.

ARGUMENT

I. CALIFORNIA PENAL CODE SECTION 868 REFLECTS A LONG-STANDING LEGISLATIVE INTENT TO ACCORD DEFERENCE TO A CRIMINAL DEFENDANT'S INTEREST IN CLOSING HIS PRELIMINARY HEARING.

California Penal Code section 868 was amended in 1982 to require the magistrate to exclude from the preliminary hearing all but persons necessary to the proceeding, "upon the request of the defendant and a finding by the magistrate that exclusion of the public is necessary in order to protect the defendant's right to a fair and impartial trial". (Full text set forth, supra, at p.1.)

For a hundred and thirty years prior to the 1982 amendment, section 868 had afforded the defendant the right to close his preliminary hearing at will.[2]

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[2] In 1851, the California legislature adopted the Field Code on Criminal Procedure's provision on mandatory closure. In 1872 the legislature amended the provision so as to further emphasize its mandatory nature by changing "shall
(Continued)

Provision for mandatory closure was motivated by the concern that publicity poses a threat to an accused's fair trial rights[3]. While mandatory closure was recognized as a limitation on press access (People v. Elliot, supra, 34 Cal.2d at 504), the defendant's rights to a fair trial by jury and "to protect his name from being maligned at a preliminary examination"[4] were deemed to be

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... exclude" to "must ... exclude". (Geis, "Preliminary Hearings and the Press," 8 U.C.L.A. Rev. 397, 410 (1961).) Thereafter the Legislature declined to remove the mandatory language for another 110 years despite the fact that during that 110-year period the legislature amended the statute five times (four times since 1957), reflecting considerable legislative attention. (See West's Annotated California Codes, historical note following Penal Code section 868.)

[3] The 1872 Code Commissioners, in explaining their strengthening of the section's mandatory language, commented:

"If the examination is 'necessarily public' . . . the testimony will be spread before the community, and a state of opinion may be created which will render it difficult to obtain an unprejudiced jury . . . ." San Jose Mercury News v. Municipal Court, 30 Cal.3d 498, 509, 638 P.2d 55 (1980).

(Continued)

paramount. (People v. Elliot, 54 Cal.2d 498, 504-505, 354 P.2d 225 (1960).)[5] Accordingly, section 868 was viewed as a "fundamental safeguard" of a "substantial" right, the violation of which was per se reversible error. (Id.) The right to protect one's reputation was given increased stature in 1974 when it was expressly incorporated into the list of inalienable rights guaranteed by the California Constitution.[6]

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[4] "The Legislature has specifically conferred upon an accused the right to protect his name from being maligned at a preliminary examination. This protection is too important to the innocent, as well as the guilty to permit it to be ignored by the committing magistrate." People v. Elliot, 54 Cal.2d at 505.

[5] "The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury guaranteed by the constitution." People v. Elliot, 54 Cal.2d at 54.

[6] "All people are by nature free and independent and have inalienable rights. Among these are pursuing and obtaining safety, happiness and privacy." Cal. Const., Art. 1, § 1. See, e.g., Hooper v. Deukmejian, 122 Cal.App.3d 987, 1015 (failure of the Attorney General to seal conviction records that were required to be sealed

In 1982, the California Supreme Court unanimously confirmed the constitutionality of section 868, deferring to the Legislature's limited discretion to articulate narrow exceptions to the judicial weighing of fundamental interests. San Jose Mercury News v. Municipal Court, 30 Cal.3d 498, 514, 638 P.2d 55 (1982)(opn. by Newman, J.).

In response to that decision, the California Legislature amended the section to read as set forth above. The Legislature clearly intended "that preliminary hearings should be public unless there was conflict with the defendant's right to a fair trial." (Press-Enterprise Co. v. Superior Court, 37 Cal.3d 772, 779 (1984).) However, its rejection of various bills proposing standards for closure reflected its intent that "the courts should determine the standard to be applied in weighing the

public's right of access against the defendant's fair trial right." (Id.)[7]

II. ANY FIRST AMENDMENT RIGHT OF ACCESS TO PRELIMINARY HEARINGS IS NOT A FUNDAMENTAL INTEREST AND CERTAINLY IS LESS COMPELLING THAN THE RIGHT OF ACCESS TO TRIALS.

This Court has recognized that states have a "sovereign right to adopt in [their] own Constitution[s] individual liberties more expansive than those conferred by the Federal Constitution. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980). That right is entitled to deference unless the state-

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[7] Cf. Penal Code section 868.7, enacted at the same time as the amendment to section 868, which provides for closure, upon motion of the prosecutor, of the preliminary examination, during the testimony of witnesses whose "life would be subject to substantial risk in appearing before the general public", and minor sex crime victims, "where testimony would be likely to cause serious psychological harm to the witness". For both categories of witnesses, closure is to be ordered only "where no alternative procedures are available" that would avoid the perceived harm and, in any case, "a transcript of the testimony of such witness[es] shall be made available to the public as soon as is practicable."

recognized liberty infringes upon a substantial Federal constitutional right. (Id. at 93, Marshall, J. conc.) For the reasons urged below, Robert Diaz, real party in interest and the defendant in the preliminary hearing below, respectfully submits that the federal interest in public and press access to preliminary hearings conducted in California is not so substantial as to merit interference with the state's accommodation of the competing rights at issue.

B. Public access to preliminary hearings does not serve the same objectives as access to criminal trials.

In several recent cases, this Court has found that the press and public have a qualified First Amendment right to attend criminal trials. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606; Waller v. Georgia, 467 U.S. 39, 81 L.Ed.2d 31, 37 (1984); Richmond Newspapers v.

Virginia, 448 U.S. 555, 569 (1980) (plurality opinion). That right extends to the jury voir dire proceeding. (Press-Enterprise Co. v. Superior Court, 464 U.S. 501.) In addition, Justices Blackmun, Brennan, Marshall, White and Powell have noted the existence of a qualified constitutional right to attend pretrial suppression hearings, although all but Justice Powell based that right on the sixth Amendment right to a public trial. (Gannett v. DePasquale, 443 U.S. 368 (1979).) Moreover, all five suggested distinctions between suppression hearings and preliminary examinations for purposes of the public's right of access. Thus, this case presents the Court with its first opportunity to squarely address the question of whether the First Amendment guarantees a right of access to pretrial hearings, and if so, how significant a right it is.

The Court has identified "two features of the criminal justice system . . . [that] serve to explain why a right of access to criminal trials in particular is properly afforded protection by the First Amendment": (1) "the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole"; and (2) "the criminal trial historically has been open to the press and general public". (Globe Newspaper, 457 U.S. at 605-606.)

The right of access to criminal trials gives rise to a presumption of access to pre-trial (or even non-trial) proceedings only to the extent that the societal objectives served by openness are similar. The Court's decisions in Richmond Newspapers and Globe Newspaper may not "carry any implications outside the context of criminal trials." Globe

Newspaper, 457 U.S. at 611 (O'Connor, J, conc.). "Analysis is not advanced by rhetorical statements that all information bears upon public issues; what is crucial in individual cases is whether access to a particular government process is important in terms of that very process." Richmond, 448 U.S. at 589 (Brennan and Marshall, JJ., conc.).

Societal objectives that public access to trials is deemed to advance include: (1) assurance of a fair and accurate adjudication of guilt or innocence (E.g. Estes v. Texas, 381 U.S. 532, 538-539 (1965); Richmond Newspapers, 448 U.S. at 593 (Brennan and Marshall, JJ., conc.)); (2) appearance of fairness, maintenance of public confidence in the criminal justice system, and community catharsis (Press-Enterprise, 464 U.S. at ___, 78 L.Ed. at 637; Globe Newspaper, 457 U.S. at 606); and (3) public education

about important government functions. information (Gannett, 443 U.S. at 397 (Powell, J., conc.)).

Petitioner and amici urge two main reasons -- procedural similarities between trials and preliminary hearings, and the increasing importance of preliminary hearings in California - why access to preliminary hearings advances the same values as access to trials. We submit that such arguments are unconvincing because of significant differences in function and form between preliminary hearings and trials,[8] and because preliminary hearings do not result in final adjudications and so "are not critical to the criminal justice system" in the way that trials and suppression-of-

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8 "[P]reliminary hearings are not critical to the criminal justice system . . . and they are not close equivalents of the trial itself in form." Gannett, 443 U.S. at 437.

at 437.)[9]

1. The crucial difference between preliminary hearings and trials for purposes of analyzing the objectives served by access is that preliminary hearings are not final adjudications.

A highly significant difference, however obvious, between trials (and suppression hearings) and preliminary hearings is that preliminary hearings are not final adjudications.[10] Thus, while defendants undoubtedly desire to prevail at preliminary hearings, the prosecution's burden of establishing probable cause is generally so readily met that defendants rarely offer any defense, recognizing that

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9 We note that our analysis does not rely upon a characterization of the preliminary hearing as "non-adjudicatory" or as part of the "accusatory phase" of a prosecution. (Cf. Respondent's Brief, hereafter "RB", p. 2.)

10 Other pre-trial proceedings that result in final decisions on issues other than guilt or innocence include hearings on demurrers, motions to dismiss, bail motions, change of venue motions in the superior court, and motions to

the liabilities of revealing their strategy and evedence far outweigh any slight possibility of defeating the charges at that stage. Defense counsel may decide not to make even those defenses that depend only on undermining the prosecution's case, due to concern that any defect exposed at the preliminary hearing will later be cured by the prosecution's "discovery" of new evidence.[11] While charges are dismissed or reduced in a significant proportion of cases following the preliminary hearing, those reductions are often obtained by suppressing evidence or otherwise exposing holes in the prosecution's case than by

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disclose the identity of an informant.

11 In California, the trial court, without setting aside the information, "may order further proceedings to correct errors alleged by the defendant [at the preliminary hearing] if the court finds that such errors are minor errors of omission, ambiguity, or technical defect . . . " (California Penal Code Section 995a(b)(1).)

proving an affirmative defense. Counsel's reluctance is likely to be particularly strong in high publicity cases because they generally involve a multiplicity of repulsive allegations, thus making dismissal of charges by the magistrate all the more unlikely.

A feature related to the preliminary nature of preliminary hearings is their timing.[12] "As with other pretrial proceedings, the climate they may generate in advance ot trial cannot always be nullified by relatively simple controls, such as sequestration and exclusion of witnesses, that are available to counter inflammatory publicity at the time of

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The prosecution may refile charges if the first information is set aside. (Penal Code Section 999.)

12 Chief Justice Burger, in declining to find the existence of a sixth amendment right of access to pretrial suppression hearings, noted that "at common law, the courts recognized that the timing of a proceeding was likely to be

trial. (San Jose Mercury News v. Municipal Court, supra, 30 Cal.3d 498, 511.)[13] Although this point is almost too obvious to state let alone emphasize, it nevertheless is central to any analysis of access rights and must be weighed heavily.

2. Access to preliminary hearings does not contribute to the fairness of either the preliminary hearings themselves or the criminal justice system in general.

This Court has concluded that,

> "Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, [and] cause all trial participants to perform their duties more conscientiously . . . ."

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critical." (Gannett, 443 U.S. at 395). For him, "the essence [of the discussion] . . . is that by definition 'pretrial proceedings' are exactly that." Gannett, 443 U.S. at 397.

13 See also, Richmond Newspapers, 448

Gannett, 443 U.S. at 383. See also, Waller, 81 L.Ed. at 38; Press-Enterprise, 78 L.Ed.2d at 637.)

Fairness is the overriding objective to be served by public access. "The central aim of a criminal proceeding must be to try the accused fairly ...." (Waller v. Georgia, 467 U.S. 39, 81 L.Ed. 2d at 38 (1984). See also,e.g., Estes v. Texas, 381 U.S. 532, 540 (1965). in Nebraska Press Assn. v. Stuart, 427 U.S 531, 586 (1976).)

Justices Blackmun, Brennan, White, and Marshall have suggested that it is precisely the fact that "[e]ach side has incentive to prevail" at trials and suppression hearings that publicity of those hearings advances their actual fairness. (Gannett, 443 U.S. at 434.) The defendant's lack of incentive to prevail at his preliminary hearing seriously detracts from any contributions to

fairness to be gained by public access. In the vast majority of cases, the effect of press access to the preliminary hearing is that the potential jury pool is exposed only and overwhelmingly to the prosecution's evidence.

Petitioner and its amici urge that the procedural similarities between preliminary hearings and trials constitute a strong reason for access. However, it is precisely due to the procedural, even visual, similarities that preliminary hearings bear such high potential for causing prejudice. As noted by the California Supreme Court:

> "Prejudice at times may be acute because of the superficial resemblence between preliminary hearing and trial. . . . The distinct functions served by the two proceedings are not always clear to non-lawyers. They may ascribe to a one-sided preliminary hearing the legitimacy and credibility of a trial. Accordingly, a defendant denied the protection of section 868 might feel compelled to abandon his

> right of silence at the hearing and to embrace a tactic of trying the case in the media."

San Jose Mercury-News v. Municipal Court, supra, 30 Cal.3d 498, 512.

Moreover, real party questions whether public access to preliminary hearings does in fact encourage witnesses to come forward and testify truthfully. California's Attorney General, in defending the value of the secrecy of grand jury proceedings has urged, inter alia, that "witnesses may fear testifying in court; the case may have potential for prejudicial publicity; [and] publicity may jeopardize a continuing investigation . . . ." (Attorney General's brief, cited in Hawkins v. Superior Court 22 Cal.3d 584, 593, n. 6, 586 P.2d 916 (1978). In the instant case, neither the California Attorney General (see brief at pp. 6-8) nor the Riverside County District Attorney (see brief at pp. 8-9), the two representatives in the instant case most familiar with the prosecutorial view of the realities of criminal prosecutions in California, contend that open preliminary hearings will have the salutory effect of encouraging witnesses to come forward and testify truthfully.[14] Certainly, in highly publicized cases, which are chiefly the only ones relevant to the instant inquiry, any additional publicity of the preliminary hearing could hardly be expected to be significant in encouraging new witnesses to identify themselves.

In addition, we question whether public access to preliminary hearings improves the participants' conscientiousness, or only the appearance of conscientiousness. While public access may

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14 For the above-given reasons we strongly disagree with petitioner's suggestion that "the ferreting out of additional witnesses with relevant testimony" may be even more compelling at the preliminary hearing stage.

improve the decorum of all participants, access logically increases the pressure on the magistrate, particularly in high publicity cases, to take public opinion into account in determining whether probable cause exists.[15] A magistrate may be more susceptible to public opinion than a trial judge because his decisions are not final and accordingly he may feel less responsibility to exercise his discretion properly.

3. Access to preliminary hearings does not significantly serve the appearance of fairness or community catharsis.

Appearance of fairness is less significant a value when procedures can be evaluated for actual fairness. Fairness and the appearance of fairness are both satisfied by procedural protections and by

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(Petitioner's Brief, hereafter "PB", at pp. 13-14.)

15 See, e.g., Winsett v. McGinness, 617 F.2d 996 (3d Cir. 1980) (en banc) ("consideration of public reaction could be dangerous to and destructive of procedural due process" in

the right to appellate review. Fairness of procedures is to be contrasted with the fairness of particular adjudicators. Whether a judge is actually biased is difficult to evaluate; what is accessible to evaluation are concrete indicators that raise an appearance of fairness or lack of fairness. For those reasons, appearance of fairness plays a far more significant role regarding adjudicators than procedures.[16]

The interest in assuring the appearance of fairness is "for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned ...." (In re Oliver, 333 U.S.

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determining inmate's entitlement to work release), cert. den. sub nom., Anderson v. Winsett, 449 U.S. 1093 (1981).

16 To the extent that the appearance of fairness is deemed a significant value, real party submits that it must give way not only to protections of fairness in fact but also to the presumption of defendant's innocence. One danger

257, 270, n. 25, cited in Gannett, 443 U.S. at 380.) Thus, a closure request by the defendant himself should not impair the appearance of fairness.[17] In any event, release of the transcripts of the preliminary hearing at such time when the risk of prejudice to the defendant's fair trial right has passed, should dissipate any lingering concern over any appearance of unfairness.

Community catharsis is the objective served by the appearance of fairness regarding crimes that arouse shock and outrage in the community.[18] Catharsis is

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posed by an open preliminary hearing is that because of the low burden of proof placed on the prosecution the decision to hold the defendant for trial may turn the presumption of innocence on its head.

[17] Both Oliver, 33 U.S. 257 and Levine v. United States, 362 U.S. 610, 616 (1960), cited by various Justices involved closure of a contempt trial over the defendant's objection. (See, e.g., Richmond Newspapers, 443 U.S. at 594 (Rehnquist, J., conc.).) Accordingly, appearances of fairness were doubly offended by the summary nature of the proceeding as well as by closure over the defendant's objection. Those cases, we respectfully submit, hardly stands as compelling precedent for a broad public interest in the appearance of fairness of preliminary hearings.

(Continued)

achieved less by access to the proceedings themselves than by harsh penalties. Thus, for example, in the case of Dan White, the man who shot to death the mayor and the first gay supervisor of San Francisco in 1979, community catharsis was not achieved, despite public access to and extensive press coverage of the trial, because White was convicted only of manslaughter. Catharsis was only realized upon White's suicide six years later.

Petitioner suggests that "[n]o greater frustration of this fundamental, natural yearning to see justice done' [citation omitted] can occur than when, after a secret preliminary hearing, the suspect is released." (PB at p. 15.) For the above-described reasons, we strongly

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[18] "When a shocking crime occurs, a

disagree with the suggestion that such frustration is a result of secrecy. We submit that the public would be equally frustrated if after a public hearing, charges were dismissed for such reasons as procedural fairness not readily appreciated by the public. The Court's recognition of the existence of the public's frustration, even rage, at lenient punishments in notorious cases suggests all the more reason for insulating preliminary decisions from intense, contemporaneous public scrutiny and pressure.

More important to the achievement of catharsis than public access to preliminary proceedings is the community's opportunity to have the trial occur promptly and within its midst. Open preliminary examinations threaten those interests in that they may force venue changes or delays to dissipate any effects

of publicity.

In California, catharsis is further served by the recently created right of victims and their families to attend and speak at sentencing and parole hearings. (See Penal Code sections 1191.1 and 3043 and section 1767 of the Welfare and Institutions Code.) Because of the court's fairly broad sentencing discretion for serious crimes, input at sentencing and parole hearings provides a more effective and rational method of satisfying the community's desire for catharsis than does access to preliminary hearings.

4. Access to preliminary hearings does not substantially further the public's interest in obtaining information about important government functions.

Access rights also depend in part on the value of exposing particular government functions to public view.[19] However, "because the stretch of this

protection is theoretically endless ... it must be invoked with discrimination and temperance." (Richmond Newspapers, 448 U.S. at 588 (Brennan and Marshall, JJ., conc.).)

Petitioner and some of its amici contend that the public has an interest in access to preliminary hearings because the preliminary hearing is a "critical stage" of criminal prosecutions in California. (See Petitioner's Brief at p. 8.) In reaching this conclusion they rely on cases that have found the preliminary hearing to be a critical stage for purposes of determining the existence of the defendant's right to counsel. (See,

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community reaction of outrage and public protest often follows. [Citation omitted.] Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Richmond Newspapers, 448 U.S. at 571.

[19] This value arises from the "assumption that valuable public debate--as well as other civic behavior--must be informed" (Richmond

e.g., Petitioner's Brief, at p. 8, citing Hawkins v. Superior Court, 22 Cal.3d 584, 588 (1978) and Coleman v. Alabama, 399 U.S. 1, 9-10 (1970). But, there is no rational relation between the fact that the defendant is entitled to the assistance of counsel at a particular stage and the importance of that stage to public debate. Such a contention would argue for access to such procedures as line-ups and in-custody interrogation after the defendant's assertion of his right to counsel.[20]

Petitioner argues that preliminary hearings are critical stages because, "with relatively fewer criminal cases actually going to trial" (PB, pp. 6-7), preliminary hearings are becoming the only

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Newspapers, 448 U.S. at 487 (Brennan and Marshall, JJ., conc.)) and, more particularly, from "the importance of the public's having accurate information concerning the operation of its criminal justice system." (Gannett, at 397

formal judicial hearings held in an increasing number of cases. (PB, pp. 17-18.)

First, that contention is based on a false premise. Available statistics suggest that the percentage of trials in California is actually increasing.[21] Moreover, contrary to petitioner's suggestion (PB, at p. 17, n. 6), recently added Penal Code section 1192.7, precluding plea bargaining after preliminary hearings except in certain limited circumstances, logically should increase the number of trials in California.[22]

(Powell, J., concurring.)

20 A logical extension would be to allow access to any proceedings at which an accused was represented by counsel, such as parole hearings and prison disciplinary hearings.

21 According to petitioner's figures, in the 1983-84 fiscal year, slightly more than 10% of felony arrests were disposed of by trial. However, in 1978, "only 3.2 % of all felony-arrest dispositions in [California] involved trials. San Jose Mercury News, supra, 30 Cal.3d 498, 511, 638 P.2d 655. See also Gannett, 443 U.S. at 435, fn. (Continued)

Second, and more importantly, it is a weak argument that access to preliminary hearings should be made a significant right simply because trials, clearly the critical stage of a criminal prosecution, occur less frequently. As noted by respondent (see RB, at p. 10) that argument logically would imply a right of access to the prosecutor's files, which reflect the most important decisions made -- regarding which charges to press and what plea bargains to make -- in most cases that do not go to trial.

Moreover, public education is equally well served by release of transcripts once danger of taint due to publicity has passed as by public access to the proceedings themselves. To the extent that timeliness of news reporting is important in order to catch the public's interest, sufficient timely information may be provided to the press

and public by counsel. Running newspaper commentary is more likely to distort the information and its significance than would release of the transcripts in toto at some time past the period of likely prejudice.

To the extent that legislative reform is prompted by reactions to ungoing proceedings, as petitioner contends, experience shows that prosecutors and family members of victims -- who are entitled to access despite closure to the general public -- are the people most likely to spearhead any reform efforts.[23]

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[23] While petitioner points to one notorious California child molestation case, the McMartin Pre-School case, as having spawned numberous legislative bills, its conclusion that access to the preliminary hearing played a significant role in generating public interest is not as self-evident as petitioner would have the reader believe. (See PB, at p. 16.) That case received a tremendous amount of publicity at the time that charges were filed, generating sufficient public attention as to attract legislative interest, thus creating a climate in which parents of witnesses, prosecutors, and prosecutor's (Continued)

Justice Powell, in noting a limited First Amendment access right to pretrial proceedings, was careful to observe that "not all pretrial matters are so important for public scrutiny as is a suppression hearing...." (Gannett, 443 U.S. at 397, fn. 1.)

> "[T]he issues considered at [suppression] hearings are of great moment beyond their importance to the outcome of a particular prosecution. A motion to suppress typically involves ... allegations of misconduct by police and prosecution that raise constitutional issues. ... The searches and interrogations that such hear-

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organizations were able to carry their legislative campaigns forward on their own.

The McMartin case equally dramatically illustrates the adverse effects of publicity on fairness of the preliminary hearing itself, threat of prejudice to fair trial rights, and massive damage to defendants', and even witnesses', reputations. All of the out-of-custody defendants have moved from their homes, many to different states. Daily reportage collapses 7 hours of hearings into a few paragraphs of print or seconds of T.V. time. Because the media tend to be more interested in a case at its beginning and more interested in the beginning of each witness's testimony, media attention is paid to the prosecution's case almost exclusively.

> ings evaluate do not take place in public. The hearing therefore usually presents the only opportunity the public has to learn about police and prosecutorial conduct, and about allegations that those responsible to the public for the enforcement of law themselves are breaking it." (Gannett, 443 U.S. at 435 (Blackmun, Brennan, White, and Marshall, JJ. conc. and dis.))

In contrast, preliminary hearings rarely involve such issues of general public concern.[24]

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24 We disagree with petitioner's assessment that suppression motions are "a standard part of the bill of fare" of preliminary hearings in California. (PB, at p. 11.) However, it is undeniably true that preliminary hearings may be joined with suppression hearings, motions to dismiss and other motions that raise constitutional objections. Some witnesses may be called to testify regarding facts relating to more than one hearing. However, the hearings remain distinct and it should be possible to separate the testimony, close the preliminary hearing, and open the others.

C. The defendant's right to close his preliminary hearing has long been recognized, particularly in California.

In Richmond, six Justices stressed the importance of the long history of public trials in recognizing a First Amendment right of access to trials. (Burger, C.J., and White and Stevens, JJ. at p. 580; Brennan and Marshall, JJ. at 589-590; and Blackmun, J. at 601.) The centrality of the tradition of openness is reflected in the court's holding "that the right to attend criminal trials is implicit in the gurantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated. [Citation omitted.]" Richmond, 448 U.S. at 580 (emphasis added). Justice Blackmun, in a concurring opinion, noted with gratification that the

Court had moved beyond its denial of the importance of legal history in Gannett and was "now looking to and relying upon legal history in determining the fundamental public character of the criminal trial." Id., at 601.

In its historical inquiries, this Court has looked for more than a tradition of de facto openness.[25] In addition, it has considered : (1) whether there was an historical recognition of any countervailing rights or interests in closure; (2) whether any such presumptions or interests were recognized at the time of the First Amendment's adoption[26] and (3) whether

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25 As noted by the Court, "This argument . . . that since exclusion of members of the pbulic is relatively rare, there must be a constitutional public right to a public trial . . . confuses the existence of a constitutional right with the common-law tradition of open civil and criminal proceedings. Gannett, 443 U.S. at 388, n. 19.

26 See, e.g., Richmond, 448 U.S. at 569: "[A]t the time when our organic laws were adopted, (Continued)

openness was considered an instrinsic aspect of the proceeding.[27]

Consideration of the three above-noted factors argues against finding a tradition of open access to preliminary hearings over a defendant's objections. In Gannett, seven members of this Court concluded that preliminary hearings historically were subject to closure. As Justice Stevens, writing for the Court,

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criminal trials both here and in England had long been presumptively open."; Richmond, at 576: "the First Amendment guarantees of speech and press prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted". (Emphasis added.) See also, Press-Enterprise: "[T]he question we address--whether the voir dire process must be open--focuses on First . . . Amendment values and the historical backdrop against which the First Amendment was enacted." 78 L.Ed.2d at 638, n. 8).

27 "[C]ontemporary writings confirm the recognition that part of the very nature of a criminal trial was its openness to those who wished to attend." Richmond Newspapers, 448 U.S. at 568. That "criminal trial both here and in England had long been presumptively open ... is no quirk of history; rather, it has long been recongized as an indispensable attribute of an Anglo-American trial." Id. at 569.

noted:

> "[T]here exists no persuasive evidence that at common law members of the public had any right to attend pretrial proceedings; indeed, there is substantial evidence to the contrary. [Footnote omitted.] By the time of the adoption of the Constitution, public trials were clearly associated with the protection of the defendant. [Footnote omitted.] And pre-trial proceedings, precisely because of the same concern for a fair trial, were never characterized by the same degree of openness as were actual trials. [Footnote omitted.]" Gannett, 443 U.S. at 387-388.

This historical assessment is consistent with the research of the main authority relied on by petitioner and amici to support a contrary conclusion. (Geis, "Preliminary Hearings, 8 U.CL.A. Rev. 397 (1961), quoted in Petitioner's Brief, at p. 20 and, e.g., brief of amici California news organizations, at pp. 19-21.) Geis notes that "[p]reliminary hearings in the American colonies closely followed the prescriptions of the [English] statutes" which were closed to

the accused as well as the press and public. Geis, pp. 399, 406.

The American statutes remained unchanged until the mid-nineteenth century. Id. at 407. Thus, at the time of the adoption of the First Amendment, American laws provided for closed preliminary hearings. Whether or not there was a practice of opening them to the public [28], there can hardly be said to have been a presumption or right of public access at that time.

The new generation of U.S. statutes enacted in the mid to late nineteenth century was typified by the

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[28] Geis notes that at some point, a trend developed of opening preliminary hearings in practice. (Geis, p. 407.) However, the earliest case he cites as evidence of this developing trend was reported in 1898. Id., n. 54. Most of the cases are from the 1920s and '30s. Id., nn. 53 and 54. Moreover, during the same period, preliminary examinations were presumptively closed in England. See F. Maitland, Justice and Police 129 (1885), quoted in Gannett, 443 U.S. at 389.

provision of the New York Field Code of Criminal Procedure, as revised in 1888.[29] That statute read:

> "The magistrate may also, upon request of the defendant, exclude from the examination, every person, except [various named functionaries and] . . . the defendant and his counsel . . . ."

Id. at 407-408. California and five other states adopted Field Code provisions which varied from the above only in that they made closure mandatory rather than discretionary upon request of the defendant. Id. at 409.[30] Other states adopted similar

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[29] Geis recounts that the original statute required the magistrate to close the preliminary hearing upon request of the defendant. In changing the mandatory "must" to "may", the New York legislature "conform[ed] to the general practice elsewhere in the United States . . . ." Id. at 409.

[30] Geis calls the Field Code provisions "a significant exception to the general practice of public preliminary hearings". Id. at 407. But, practice and law are distinct phenomena. It makes no sense to say that the laws themselves formed an exception to the practice. Significantly, Geis elsewhere suggests that the practice of the Field Code states differed little (Continued)

provisions; still others allow closure of pretrial hearings without statutory authorization. Gannett, 443 U.S. at 390, n. 23. Thus, in both Field Code and non-Field Code states, the defendant was and continues to be entitled to close his preliminary hearing at will or upon a loose showing that did not need to outweigh any competing interests or comply with any guidelines. That the general practice in Field Code and non-Field Code states may have been to hold open hearings does not detract from the historical right of defendants to close their hearings. Rather the practice appears to be due to lack of interest of defendants in asserting their right to closure.[31]

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from the majority because the statutes remained in "judicial dormancy and day-to-day disuse." (Id. at 407)

[31] As Geis notes, "Litigation concerning the Field Code provision has been sparse, and in most of the states the measure has apparently only rarely been called into use, and then only in (Continued)

Finally, there is no evidence of an historical recognition of the value of press and public access to preliminary hearings. To the contrary, English common law clearly distinguished between the privilege accorded the reporting of trials, and the absence of such a privilege of, or of any legitimate societal interest in, reporting pretrial proceedings.[32]

Similarly, the New York Commission that in 1850 recommended adoption of the

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cases which would ordinarily have been heard in closed chambers in any event." (P. 409.)

32 As declared by one presiding Lord:

> "Trials at law, fairly reported, although they may occasionally prove injurious to individuals, have been held to be privileged. Let them continue so privileged. ... But these preliminary examinations have no such privilege. Their only tendency is to prejudge those whom the law still presumes to be innocent, and to poison the sources of justice."

Rex v. Fisher, 2 Camp 563, 570-571 (NP 1811), quoted in Gannett, 443 U.S. at 389, n. 20.

Field Code's mandatory closure provision reasoned that public access could "render it difficult to obtain an unprejudiced jury" particularly "in cases of great public interest". Commission on Practice & Pleadings, Code of Criminal Procdure, Final Rep., § 202 (1850), cited in Geis, at p. 408.

The tradition of the defendant's right to close his preliminary hearing is even stronger in California. (See pp. 8-10.)

III. IF THE COURT FINDS A RIGHT OF ACCESS TO PRELIMINARY HEARINGS, THEN IT SHOULD REMAND TO THE CALIFORNIA SUPREME COURT FOR DETERMINATION OF HOW THE COMPETING INTERESTS SHOULD BE WEIGHED.

For the foregoing reasons, we respectfully submit that the Court need find no constitutional right of access to preliminary hearings. If the Court should find

that there does exist such a right, then we would urge that Penal Code section 868 and the California Supreme Court's construction of it fully comport with the Federal standard and accordingly that the case should be remanded to afford the California Court the opportunity to reevaluate its own state law in light of any misperception of the Federal law.

The Federal test for evaluating whether a particular criminal proceeding should be open to the public, once a right of access has been found, is set forth in

> Press-Enterprise:
> "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."

Press-Enterprise, 78 L.Ed.2d at 638. In addition, the magistrate should "consider

alternatives to closure and to total suppression of the transcript." (Id. at 640.)

California Penal Code § 868, permitting closure of a preliminary hearing only upon a showing that closure is necessary to protect the defendant's right to a fair trial, clearly satisfies that test. The right to a fair trial is paramount and may override even the public's interest in access to trials. (Globe Newspaper, 457 U.S. 596.) A showing that closure is "necessary" surely satisfies the requirement that closure be proved to be "essential". (See Webster's New Internat. Dict. (2d ed. 1959) p. 1635) The requirements that the magistrate narrowly tailor the closure, articulate findings and consider alternatives are consistent both with section 868 and with the California Supreme Court's holding.

Questions left open by Press-Enterprise include: (1) the standard to be applied in assessing the necessity of closure, and (2) the party who is to bear the burden of showing the effectiveness or ineffectiveness of reasonable alternatives to closure.

Real party submits that those questions properly should be left to the states.

> "If [a] state court has proceeded on an incorrect perception of federal law [in interpreting state law] it has been this Court's practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state law question free of misapprehensions about the scope of federal law." Three Affiliated Tribes v. Wold Engineering, ___ U.S. ___, 81 L.Ed.2d 113, 124, 104 S.Ct. (1984).

Remand is particularly appropriate in the instant case because of this Court's policy of allowing states a measure of discretion in prescribing standards and procedures by which to weigh

individual liberties. Thus, in Pruneyard Shopping Center v. Robins, supra 447 U.S. 74 (1980), the Court deferred to the California Supreme Court's decision (reported as Robins v. Pruneyard Shopping Center, 23 Cal.3d 899, 592 P.2d 341 (opn. by Newman, J.)) to balance free speech and property rights under its own Constitution so as to give greater weight to the free speech right than this Court had done under the Federal Constitution. This Court's balancing under the Federal Constitution did not limit the state's "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." (Id. at 81, and supra, at p. 12.) In so ruling, this Court did not go so far as to suggest "that rights of property are to be defined solely by state law, or that there is no federal constitutional barrier to the

abrogation of common-law rights by . . . a state government." (Id. at 93, Marshall, J., conc.) Rather, the Court concluded that the federal interest violated -- namely, the right to exclude others from a large private shopping mall -- was not so weighty as to preclude states from weighing other individual liberties more heavily. While the Court found that the right to exclude others from private property is "one of the essential sticks in the bundle of property rights" (id. at 82, emphasis added), where the private property at issue is a large shopping mall, no "core" right has been infringed. (Id. at 93)(opn. by Marshall, conc.)

Similarly, we submit that, while the right of access to "critical" stages of criminal proceedings may be "essential", state limitation of access to preliminary hearings does not impinge upon any "core" rights.[33] Accordingly, this Court

should remand the case to allow the California Supreme Court to set its own standards and procedures for permitting closure of preliminary hearings upon the defendant's request.

IV. IF THE COURT DECIDES TO ARTICULATE A BALANCING TEST, THEN "REASONABLE LIKELIHOOD OF PREJUDICE" IS APPROPRIATE.

If this Court should decide that the right of access to preliminary hearings is a core First Amendment right and so decides to articulate the standard for permitting closure as requested by petitioner (PB p. 22-23), real party submits that a showing of a "reasonable

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[33] California's weighing of the defendant's right to a fair trial more heavily than the public's interest in access to preliminary hearings does not signify any disregard for First Amendment rights. As Pruneyard demonstrates, California affords greater protection for some speech rights than does the Federal Constitution. Rather, California has forthrightly recognized the extent of the conflict between fair trial and speech-and-press rights in the preliminary hearing context, and has chosen to grant greater deference to the fair trial right.

likelihood of prejudice" to the defendant's fair trial rights is appropriate. In Waller v. Georgia, 467 U.S. 39, 81 L.Ed.2d 31 (1984) this Court concluded that:

> "the party seeking to close [a pretrial suppression] hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." (Id. at 39, emphasis added.)

For the reasons advanced in ¶ II.B.4., supra, closure of a preliminary hearing should certainly require no greater a showing than closure of a preliminary hearing. In particular, we urge rejection of the "substantial probability of irreparable harm" test advocated by petitioner. That standard, articulated by the dissenters in Gannett, and adopted by the Ninth Circuit in U.S.

v. Brooklier, 685 F.2d 1162 (9th Cir. 1982) should be rejected for several reasons. First, the standard is unduly burdensome. It is the same standard adopted by the Court in Nebraska Press Assn. v. Stuart, supra, 427 U.S. 539 for imosing a gag order, "'one of the most extraordinary remedies known to our jurisprudence" (id, a 562). Second, the dissenters based the standard on the sixth amendment right to attend pretrial suppression hearings which, as noted above, they deemed "[u]nlike almost any other proceeding apart from the trial itself, implicates all the policies that require that the trial be public." (Gannett, 443 U.S. at 436.)

CONCLUSION

For the foregoing reasons, real party in interest, Robert Diaz, through counsel, urges the Court to find that public access to the California

preliminary hearing is not such a substantial federal interest as to warrant interference with California's weighing of fair trial and free-speech-and-press rights.

Dated: January 13, 1986

Respectfully submitted,

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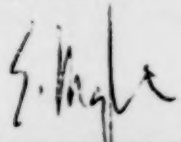
SANDRA COLIVER



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* Robert Diaz and his counsel gratefully acknowledge the volunteer critique of Frank C. Newman, retired Justice of the California Supreme Court and Ralston Professor of International Law.